No. 137 No. 12920

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IN THE

United States Court of Appeals for the Sixth Circuit

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO), a labor organization, and BENTON HARBOR MALLEABLE LOCAL No. 880 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), a labor organization,
Defendants and Appellants,

vs.

BENTON HARBOR MALLEABLE INDUSTRIES, a corporation,
Plaintiff and Appellee

LIBRARY SUPREME COURT, U.S.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

BRIEF OF DEFENDANTS AND APPELLANTS and APPENDIX

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REDMOND H. ROCHE, JR.
Attorney for Defendants and Appellants,
8000 East Jefferson Avenue,
Detroit 14, Michigan.

HAROLD A. CRANEFIELD,
Of Counsel,
8000 East Jefferson Avenue,
Detroit 14, Michigan.

STATEMENT OF QUESTIONS INVOLVED

1. Should the appellee's action be stayed pursuant to Section 3 of the United States Arbitration Act while the question of whether there is any issue referable to arbitration involved in appellee's cause of action is decided, in the first instance, by an arbitrator?

District Court answered "No".
Appellants contend the answer should be "Yes".

2. Should the appellee's action be stayed pursuant to Section 3 of the United States Arbitration Act because there are, as a matter of law, one or more issues referable to arbitration involved in appellee's cause of action?

District Court answered "No".
Appellants contend the answer should be "Yes".

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*Not yet available in Federal Reporter.

**Citation is to Labor Arbitration Reports published by Bureau of National Affairs; case not yet available in New York Supplement.

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No.....

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Defendants and Appellants,

vs.

BENTON HARBOR MALLEABLE INDUSTRIES, a corporation,
Plaintiff and Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

BRIEF OF DEFENDANTS AND APPELLANTS

STATEMENT OF FACTS

On June 24, 1952, plaintiff-appellee filed a civil complaint against defendants-appellants alleging in substance two separate breaches of contract. These allegations of breach were based upon the claim that strikes in March and June of 1952 were in breach of a "no-strike" covenant in the collective bargaining agreement of February 26, 1952 then existing between the appellee and appellants. On May 13, 1953, appellee filed an amended and supplemental complaint reiterating the allegations of the original complaint and adding an allegation of a breach of the "no-strike" covenant involving a strike commencing in April of 1953 (App. 2a-13a).

On June 3rd, 1953, appellants filed a motion to dismiss the action or, in the alternative, to stay proceedings pending arbitration pursuant to Section 3 of the United States Arbitration Act, (Title 9 U. S. C.)[1] (App. 16a-20a). Subsequent to June 3, 1953, there were proceedings involving both appellee's attempt to invoke discovery proceedings and an amended motion to dismiss, or in the alternative stay, filed by appellants; proceedings which are not involved in this appeal. The amended motion did not affect that part of the original motion which was concerned with appellants' alternative position (i.e., to stay proceedings pending arbitration) and therefore is not relevant to this appeal.

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[1] "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

On May 28, 1956, the District Court handed down an opinion (App. 20a-28a) which, among other things, denied appellants' amended motion to dismiss on all grounds, and, further, denied appellants' alternative motion to stay proceedings pending arbitration. On the same date, an order was entered in accordance with said opinion (App. 1a, Relevant Docket Entries).

Appellants herein appeal only from that portion of the decision and order which denies appellants' alternative motion to stay pending arbitration. Such is the only part of the decision and order which is appealable at this time. The determination by the District Court, and the review by this Court, of the merits of said motion to stay necessarily must be based upon appellee's amended and supplemental complaint (App. 2a-13a). The pertinent part of that complaint is paragraph 12 thereof which recites the alleged breaches of contract. Attached to said complaint as an exhibit thereto was the collective bargaining contract alleged to have been entered into between appellee and appellants on the 26th day of February, 1952,[2]. Articles I, II, III, VI and XI of said collective bargaining contract are included in the Appendix at pages 8a-13a.

Also included in the Appendix at pages 14a-15a is a one-page supplement to said collective bargaining agreement of February 26, 1952, which supplement is dated February 29, 1952. This supplement was not included as an exhibit to appellee's supplemental complaint and has not formally been introduced into the record. It would normally be

[2] Appellants moved to dismiss as to the International Union on the ground that it appears on the face of the contract that the International is not a party. This point, however, is irrelevant to this appeal, and for purposes of this appeal, we need not distinguish between appellants as contracting parties.

attached to appellants' answer and an answer has not as yet been filed. However, a copy of this supplement was attached to one of appellants' briefs to the District Court as an appendix thereto without any objection by appellee. The authenticity of this supplement is not in question, its genuineness having been admitted by the appellee's attorney at the oral argument in this matter held before the District Court on December 2nd, 1954 when a photostat of the supplement was exhibited to the presiding judge.

The breaches of contract alleged by appellee are set forth as violations of Article III, Section 1 of said contract of February 26, 1952 (App. 10a-12a). This Article is entitled "Grievance Procedure".[3] Said Section 1 also

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[3] Section 1 of Article III provides:

"Shall differences arise between the Company and the Union as to the meaning and application of this Agreement, or should any local trouble arise, an earnest effort shall be made to settle such differences, and it is agreed by the Union that there shall be no strike, slowdown or stoppage of work on the part of the Union or its members and there shall be no lockout on the part of the Company during the term of this contract. The parties shall in all instances resort to the following steps of the grievance procedure."

Sections 2, 3 and 4 set forth various stages of a normal grievance procedure; Section 2 providing for discussion between an employee and/or his steward, and the department foreman; Section 3 providing for discussion between an employee's division committeeman and the employer's divisional superintendent; Section 4 providing specifically for grievances pertaining to a disputed production rate and setting forth a joint time study procedure with regard thereto.

Sections 5 and 6 provide:

5. "If any grienvance cannot be settled between the divisional superintendent or designated representative of Management and the Committeeman, within two working days, it shall be referred to the Shop Committee and Management for disposition."

6. "In the event any grievance relating to the meaning or application of this Agreement is not satisfactorily disposed of in the foregoing steps of the grievance procedure, either party may sub-

(Continued on next page)

introduced a procedure for settling "differences * * * between the Company and the Union as to the meaning and application of this agreement", culminating in Section 6 which provides for an impartial arbitrator to which "either party may submit the unsettled grievance".

This appeal revolves about two very specific contentions of appellants. They are:

1. Appellants' claim that the cause of action involves issues subject to arbitration under Section 6 of Article III of the contract of February 26, 1952 is itself arbitrable.

2. Alternatively appellants' claim that appellee's cause of action involved issues arbitrable under Section 6 of Article III of the contract of February 26, 1952 is, as a matter of law, correct, and the dispute should have been submitted initially to an arbitrator rather than the District Court.

(Continued from preceding page)

mit the unsettled grievance to an impartial arbitrator agreed upon by them provided notice is given to the opposite party within fifteen (15) days after the Shop Committee-Management meeting (above referred to) of intention to arbitrate. The parties shall bear equally the expenses of arbitrartion. The Arbitrators shall have no power to add to, ignore or modify any terms of this Agreement. His decision shall be final and binding upon both parties of this Agreement."

ARGUMENT

1. SHOULD THE APPELLEE'S ACTION BE STAYED PURSUANT TO SECTION 3 OF THE UNITED STATES ARBITRATION ACT WHILE THE QUESTION OF WHETHER THERE IS AN ISSUE REFERABLE TO ARBITRATION INVOLVED IN APPELLEE'S CAUSE OF ACTION IS DECIDED, IN THE FIRST INSTANCE, BY AN ARBITRATOR?

District Court answered "No".
Appellants contend the answer should be "Yes".

Appellants contend that modern methods of arbitration require that the primary decision as to what is arbitrable be itself left to an arbitrator operating under the contract, the court confining itself to granting a stay pending arbitration, following which the court would, if so requested by either party, review the arbitration award including the arbitrator's decision on arbitrability; i.e. on his own jurisdiction.

Though this contract does not specify what rules or regulations govern a question submitted to arbitration, it may properly be assumed that the parties intended the rules of the American Arbitration Association to apply. The fact that no such specific provision is made is unimportant. As is stated in *3 Collective Bargaining Negotiations and Contracts* (Bureau of National Affairs) 51:301:

> "Most arbitration services are obtained from such well established private agencies as the American Arbitration Association, or from federal or from state agencies. * * * All such agencies have their own standardized rules for procedure and for conducting arbitration proceedings. Possibly as a result of this fact, clauses specifying rules and pro-

cedures for the conduct of arbitral hearings, for submissions, for obtaining evidence, etc., are relatively infrequent."

As a matter of practice today, it may be assumed that all arbitration agreements, not specifically otherwise providing, are intended to be governed by the rules of the American Arbitration Association. One of the most important rules of that association is that the question of arbitrability is to be decided by the arbitrator. (See *Textile Workers Union v. Aleo Manufacturing Co.*, 94 F. Supp. 626, (D. C., N. C., 1950), reviewing and preliminarily approving the arbitrator's decision in *Matter of Aleo Manufacturing Co.*, 15 Labor Arbitration Reports 715).

When faced with a similar problem in *Auto Workers Local 379 v. Jacobs Manufacturing Co.*, 120 F. Supp. 228 (D. C. Conn., 1953) the court very succinctly posed the question herein involved in the following words:

> "Consideration of this question, however, involves first passing on the question of the arbitration panel's jurisdiction to decide jurisdiction. That is to say, should the case go to the arbitration panel for them to decide whether they have jurisdiction over the dispute? If the court's decision on this question is in the affirmative, then the court need not consider the merits of the jurisdictional question * * *."

The court there squarely answered the question in the affirmative where the contract, as in our case, provided for arbitration of disputes concerning the "meaning and application" of the contract.

Post Publishing Company v. Cort, 134 N. E. 2 431, ..., a very recent decision by the Massachusetts Su-

preme Judicial Court (May 29, 1956), is in full accord with the postion of the District Court in *Auto Workers Local 379 v. Jacobs Manufacturing Co., supra.*

Chief Judge Magruder, of the First Circuit, in *United Electrical Workers v. General Electric Company*, 233 F. 2 85, decided April 25, 1956, concluding a very exhaustive treatment of the question of a federal court enforcing an agreement to arbitrate, gives specific consideration to this precise question. Judge Magruder states:

> "* * * [An] arbitration clause, either expressly or by broadly stating its scope to include disputed interpretations of any contract term, may refer the very question of arbitrability to the arbitrator for decision. That is, just as a court has jurisdiction to determine its own jurisdiction, the arbitrator in such a case has power to interpret the scope of the arbitration terms of the contract, including questions of whether the dispute at issue is made arbitrable * * *."

The decision goes on to examine both possibilities and to provide against misuse of the doctrine of initial decision on arbitrability by the arbitrator, stating that if "the applicant's claim of arbitrability is not frivolous or patently baseless, an order can be given, with the decision on arbitrability to be made in the arbitration proceedings that follow". Citing *Auto Workers Local 379 v. Jacobs Manufacturing Company, supra.*

It can scarcely be contended that appellants' position is frivolous. In the *Jacobs* and *Post* cases, *supra*, in both of which the courts held that, to paraphrase Judge Magruder's language, the arbitration clause was sufficiently broad to include the dispute over the arbitrability controversy, the coverage of the arbitration language was substantially identical with that of the contract under con-

sideration herein. In *Post*, the pertinent phrase was "grievances or disputes arising from the application of this agreement". To the extent that this language defining the scope of arbitration in the clause therein under consideration differs from the language of the contract herein, the latter is substantially broader.

The key language on the scope of arbitration in the subject contract appears in Sections 1 and 6 of Article III (App. 10a, 11a). Section 1 commences with the statement that "Shall differences arise between the Company and the Union as to the meaning and application of this Agreement * * *". Section 1, after prohibiting strikes, lockouts, etc., concludes with the statement that "The parties shall in all instances resort to the following steps of the grievance procedure". Sections 2 through 5 set forth the tradtional steps of a grievance procedure. (See footnote 3, *infra*, p. 4.) The key language in Section 6 states that:

> "In the event any grievance relating to the meaning or application of this agreement is not satisfactorily disposed of in the foregoing steps of the grievance procedure, either party may submit the unsettled grievance to an impartial arbitrator * * *."

The only difference between the key language in Section 6 and the introductory language of Section 1 is that Section 6 uses the word "grievance" as the obvious equivalent of "difference" in Section 1.[4]

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[4] Appellants discuss more fully in the subsequent portion of this brief (p. 18) their contention that the pertinent language of Article III of the contract herein is sufficiently broad to provide as a matter of law, for arbitration of the issues involved in appellee's cause of action. On the point here being argued, we need only be concerned with establishing that our claim that these issues are arbitrable is neither "frivolous or patently baseless".

Since Article III sets forth a procedure, culminating in arbitration, for deciding "differences * * * between the Company and the Union as to the meaning and application of this agreement", and since the question of the meaning and application (or put another way, the *scope*) of the arbitration provision contained in Section 6 of the contract is at issue between the parties, there would seem to be no reason for denying appellants the right to have the initial decision as to the scope of the arbitration provision in Section 6 decided, pursuant to the direction of the contract, by an arbitrator.

As the courts have held in the foregoing cited case, in the face of such a broadly worded arbitration provision, it is a subversion of the parties' own agreement for the Court to make the initial decision on arbitrability. Appellants contend that this is the very type of situation Judge Magruder referred to when he pointed out the correctness, in such a situation, of referring the issue of arbitrability itself to an arbitrator. No practical difficulties arise even in the event a court should subsequently reverse an arbitrator's decision that the substantive issue was arbitrable, for Justice Wilkins in *Post Publishing Co. v. Cort, supra,* points out that:

> "We see no occasion to interrupt the normal course of the arbitration procedure voluntarily adopted by the parties themselves. In so deciding, we venture no statement as to the validity of any award. See *Burns v. Thomas Cook and Sons, Inc.*, 317 Mass. 398, 401, and [citing cases]. Parties may raise before an arbitrator a challenge to his jurisdiction and, without waiving that question may proceed to a hearing on the merits. The arbitrator should decide the jurisdictional question in the first instance, while the right to a judicial determination will be preserved. [Citing cases.] We see no ir-

> reparable injury in first, as promised, carrying out arbitration before the initial tribunal contemplated in the agreement."

The Arbitrator's decision as to the "meaning and application" of the arbitration section of Article III would, of course, be subject to review by the Court. Since it would be a decision based more upon law than findings of fact, the Court would be influenced by the arbitrator's decision only to the extent the Court felt the decision deserved consideration because of the skill, expertise and first-hand knowledge of the arbitrator involved as reflected in the logic and rationale of his decision. Appellants contend, nonetheless, that they are entitled to the fruits of their bargain, and that, whatever weight the Court would eventually give it, appellants are entitled to have the initial decision on the question of arbitrability decided by an arbitrator appointed pursuant to the contract.

Appellants contend that the policy they advocate (i.e., referring the jurisdictional issue of arbitrability to the arbitrator for initial decision where the arbitration clause is suitably broad) is completely consistent with, and in furtherance of, the public policy favoring arbitration as reflected by the enactment in 1925, of the United States Arbitration Act, and by numerous subsequent decisions of many courts.

Such arbitration machinery, when agreed to by the parties, is clearly in the public interest and constitutes a long step forward in promoting a basic purpose of the Labor Management Relations Act of 1947, 29 U. S. C. A. 141 *et seq.* namely, to bring about peaceful solutions of labor disputes by procedures established by collective bargaining. Thus, as was stated in *Lewittes and Sons v. United Furniture Workers*, 95 F. Supp. 851 (D. C. N. Y. 1951):

"The courts should be reluctant to strike down a clause which appears to promote peaceful labor relations rather than otherwise". Both labor and management have recognized the efficacy of arbitration for settling of labor disputes as is indicated by the fact that 80% of all collective bargaining contracts have arbitration clauses: *3 Collective Bargaining and Negotiations*, (Bureau of National Affairs) 71:1.

2. SHOULD APPELLEE'S ACTION BE STAYED PURSUANT TO SECTION 3 OF THE UNITED STATES ARBITRATION ACT BECAUSE THERE ARE, AS A MATTER OF LAW, ONE OR MORE ISSUES REFERABLE TO ARBITRATION INVOLVED IN APPELLEE'S CAUSE OF ACTION?

District Court answered "No".
Appellants contend the answer should be "Yes".

In the event this Court should hold that the issue of arbitrability of the controversy is not itself referable to arbitration, appellants contend that this Court should conclude that the issues tendered by appellee's complaint are arbitrable as a matter of law under Sections 1 through 6 of Article III of the contract pleaded. (App. 10a-11a.)

Basically, appellee complains that appellants, on a number of occasions, have breached the no-strike provision contained in Article III, Section 1 of the collective bargaining contract between appellee and appellants and that appellee has suffered financial damage as a consequence of said alleged breaches. Said Section 1 provides:

> "Shall differences arise between the Company and the Union as to the meaning and application of this Agreement, or should any local trouble arise, an earnest effort shall be made to settle such differ-

ences, *and it is agreed by the Union that there shall be no strike, slowdown or stoppage of work on the part of the Union or its members and there shall be no lockout on the part of the Company during the term of this contract.*" The parties shall in all instances resort to the following steps of the grievance procedure:" (Emphasis supplied.)

Any decision on appellee's claim for damages involves, of course; determinations as to the "meaning" of various provisions of the contract, and, particularly, a determination of the scope of the no-strike clause of Article III, Section 1 thereof.[5]

Any decision on the appellee's cause of action will also necessitate an "application" of the pertinent provisions of the collective bargaining contract, properly construed as to meaning, to the facts surrounding the alleged breaches.[6]

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[5] Determination of the meaning of the no-strike clause is, in itself, a difficult question. That there are implied exceptions to such a prohibition against strikes is well established though the precise nature of those exceptions in any given case varies with the language of the contract as well as the collective bargaining history and other related factors, *Mastro Plastics Corporation v. N. L. R. B.*, 214 F. 2d 462 (2 C. A. 1954) aff. 76 S. Ct. 349 (1956). *N. L. R. B. v. Wagner Iron Works, et al.*, 220 F. 2d 126 (C. A. 7. 1955); cert. denied 76 S. Ct. 466 (1956).

With regard to the strike alleged to have commenced in April of 1953 (the strike from which most of appellee's alleged damages apparently flow), determination of the contractual strike prohibition is further complicated by the necessity of construing said prohibition in connection with the provision of the February 29, 1952 Supplemental Agreement (App. 14a-15a) which contains an express exception to the contractual strike prohibition.

[6] The decisions in *Mastro Plastics Corp. v. N. L. R. B.* and *N. L. R. B. v. Wagner Iron Works, supra*, incidentally, have particular bearing upon the strike appellee alleges to have taken place in June of 1952. At such time as appellants file their answer herein framing more precisely the issues involved in the action, the appellee's precipitate discharge of the entire union shop committee prior to the cessation of work in June of 1952 will have a very substantial bearing on the question of whether that alleged strike was, in fact, a breach of the strike prohibition clause properly interpreted as to scope.

It would seem, then, than the issues raised by appellee's complaint are issues over which differences as to the "meaning and application" of the agreement have arisen between the parties. As set forth in detail in this argument both *supra* and *infra* (See pp. 9-10, 18-20), Section 6 of the contract providing arbitration of "any grievance relating to the meaning or application of this agreement" at the request of "either party" is necessarily equivalent, in scope, to the provision in Section 1 which introduces the procedure culminating in Section 6, a procedure clearly intended to settle, by arbitration if necessary, "differences [arising] between the company and the union as to the meaning and application of this agreement."

It would appear, therefore, that appellants are entitled to a stay of proceedings pending arbitration of the issues raised by appellee's complaint. This problem has been before a number of courts for decision. Stays have been ordered in many of these cases. See *Signal-Stat Corporation v. U. E.*, 38 L. R. R. M. 2378 (2 C. A. July 2, 1956)[7]; *Regent Quality Furniture Company v. Pollack*, 26 L A. 302 (N. Y. Sup. Ct. April 13, 1956)[7a]; *Lewittes and Sons v. United Furniture Workers*, 95 F. Supp. 851 (D. C. N. Y. 1951); *Brady Transfer and Storage Company v. Meat Drivers Union*, 30 L. R. R. M. 2535 (D. C. Ill. 1952)[7b]; *Pennsylvania Greyhound Lines v. Amalgamated Association of Motor Coach Employees*, 98 F. Supp. 789, (D. C. 1951); reversed on other grounds, 193 F. 2d 327 (C. A. 3, 1952).

The most recent of these decisions is *Signal-Stat Corporation v. U. E.*, 38 L. R. R. M. 2378 (C. A. 2, July 2, 1956). The grievance procedure there provided, in part:

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[7] Not yet available in Federal Reporter.

[7a] Citation is to Labor Arbitration Reports published by Bureau of National Affairs; case not yet available in New York Supplement.

[7b] Citation is to Labor Relations Reference Manual published by Bureau of National Affairs; not reported in the Federal Supplement.

> "All disputes, grievances or differences that may arise between the parties of this agreement shall promptly be filed in writing. * * * If no satisfactory settlement is arrived at, within 10 days of filing of said grievance, then the difference, dispute or grievance shall, at the request of either party, be immediately submitted for arbitration. * * *"

In the face of this procedure, the company brought action against the union for breach of the no-strike clause. The union sought a stay pursuant to Section 3 of the United States Arbitration Act, and the District Court denied the stay. On appeal, the Second Court of Appeals, speaking through Judge Frank, reversed the District Court and ordered a stay of proceedings pending arbitration. The Court stated:

> "We think the broad arbitration clause in the collective bargaining agreement here involved covers a dispute relating to an alleged breach of the no-strike clause. Under the agreement, 'All disputes, grievances or differences' are arbitrable. We can hardly imagine more broadly inclusive language. This phraseology distinguishes the instant case from *Markel Electric Products v. United Electric, E. & R. Workers* [202 F. 2d 435 (C. A. 2 1953)]. To the extent that the other cases cited by plaintiff require a contrary result, we think them erroneous. [Citing *United Electric R. & M. Workers v. Miller Metal Products*, 215 F. 2d 221, (C. A. 4); *International Union v. Colonial Hardwood Floor Co.*, 168 F. 2d 33, 35, 2102 (C. A. 4); *Square D Co. v. United Electric R. & M. Workers*, 123 F. Supp. 776, 2627.] We think their interpretations of similar arbitration clauses are unduly restrictive and achieve, by indirection, the same result as the old, and now generally rejected, judicial aversion to enforcing arbitration agreements. Cf. *Kulukundis Shipping Co. v. Am-*

torg Trading Co., 126 F. 2d 978, 983-85 (C. A. 2). Other cases, with which we agree, support our decision that the instant arbitrartion agreement covers a dispute arising from an alleged breach of the no-strike clause. See e. g., *Lewittes & Sons v. United Furniture Workers of America, CIO*, 95 F. Supp. 851, 853-54, (S. D. N. Y.); *Pennsylvania Greyhound Lines v. Amalgamated Ass'n*, 98 F. Supp. 789, 791, reversed on other grounds, 193 F. 2d 327, (C. A. 3); *Hudson Wholesale Grocery Co. v. Allied Trades Comm.*, 65 A. 2d 557, 559, (N. J. Ch.)."

The basis on which the Court distinguished *Markel Electric Products v. United Electrical Workers* is significant. The arbitration provisions in *Markel* are distinguishable both from the arbitration provisions in *Signal-Stat* and from those contained in the contract pleaded herein on two identical points. In *Markel*, the contract set forth a grievance and arbitration procedure for any difference between "the company and any employee". In contrast, the contractual language in both *Signal-Stat* and the instant case provide a grievance procedure and arbitration for differences between "the company and the union" or, "the parties". The Court's language in the *Markel* case illustrates how important to the decision therein reached was the contractual limitation the Court found to arise from the express limitation of the grievance and arbitration procedure to differences between "the company and any employee". The second, and even more important, distinction between the contractual language in *Markel*, and that involved in both *Signal-Stat* and the instant case, is the provision for submitting an unsettled grievance to arbitration. In *Markel*, the contract provided only that the party "filing" the grievance could submit the same to arbitration. Contrast such language with that involved

in the instant case and *Signal-Stat* where, in each, it is provided that "either party" may submit the unsettled grievance to arbitration.

These basic differences in the contractual language between the *Markel* case, on the one hand, and both *Signal-Stat* and the instant case, on the other, naturally lead to differing results. The entire thrust of the *Markel* opinion relied, basically, upon explicit language which limited the grievance and arbitration procedure to disputes of such a nature as would arise between an individual employee and the company; i.e. disputes of the nature that this Court had in mind in its consideration of the term "grievance" in *Hoover Motor Express Company v. Teamsters Union Local 327*, 217 F. 2d 49. However, as the *Signal-Stat* decision illustrates, this result, depending upon the limited nature of the contractual language, has no application to a contract, such as presented in the instant case, which provides a grievance and arbitration procedure for disputes or differences arising between the "company and the union" (much broader terminology than the "company and any employee"), and which further anticipates grievances on broad questions by providing that "either party" may submit an unsettled matter to arbitration (as contrasted with the *Markel* language permitting only "the party filing the grievance" to submit the same to arbitration). The Court in *Markel* quite properly decided that the very limited grievance and arbitration procedure therein was intended to cover specific and limited disputes of the nature that normally arose in the day to day operation of a collective bargaining contract, and which involved only a few employees. In view of the express limitation of the language of the contract relative to such grievances, it was quite consistent that only the party filing the grievance would be permitted to submit the same to arbitration.

The arbitration clause in the instant case is assimilable to that in *Signal-Stat* and is distinguishable from that in *Markel* for the same reasons the Second Circuit distinguished *Signal-Stat* from *Markel*. The fact that the contract in *Signal Stat* provides for "the difference, dispute or grievance" to be submitted by either party to arbitration is not a significant difference from the contract in the instant case providing simply that the "grievance" may be so submitted by either party. The contract in *Signal-Stat* uses the term "grievance" as the equavalent of "difference, dispute or grievance", in the sentence providing for submission to arbitration. That sentence reads:

> "If no satisfactory settlement is arrived at, within 10 days of the date of the filing said grievance, then the difference, dispute or grievance shall at the request of either party, be immediately submitted for arbitration."

As we have earlier contended, we believe that Section 6 of Article III of the contract herein was intended to equate the word "grievance" in the phrase "in the event any grievance relating to the meaning or application of this agreement is not satisfactorily disposed of in the foregoing steps of the grievance procedure, either party may submit the unsettled grievance to an impartial arbitrator * * *" with the phrase in Section 1 which provides generally for the settlement of "differences * * * between the company and the union as to the meaning and application of this agreement". Sections 2, 3 and 4 of Article III are obviously appropriate (and conventional) procedures for processing grievances of individual employees and it is equally obvious that they are inappropriate for processing disputes between the union and the company "as to the meaning and application" of the contract. Such disputes lend themselves to the procedures prescribed by Sections 5

and 6. Accordingly, a construction of the entire article which denies the equivalence of "grievance" in Section 6 with the "differences" referred to in Section 1 would relegate basic disputes between the union and the company as to the meaning of the contract to a wholly inappropriate procedure and would be non-arbitrable. On such a construction only individual employee grievances would be arbitrable under Section 6. As will be developed at a later point the contract is pregnant with many possibilities of dispute not arising out of individual employee grievances. Section 1 recognizes this fact. But a construction of the entire article which imputes to the parties an intent as to the porcedures for the resolution of such disputes so unrealistic and at such variance with common practice in industrial relations would do violence to elementary principles of construction.

Admittedly, Article III is not a model of precision. It is inartistically drawn and merges at least two, if not three subjects which might better have been treated separately, viz. (1) the disposition of individual employee grievances (2) the resolution of basic disputes over the contract between the union and the company (3) arbitration. But its deficiencies are not such as to render it nugatory and a construction which gives a reasonable effect to each of its terms and to the Article in its entirety in harmony with the stated purposes of the parties in contracting (See Preamble, App. 8a) should commend itself to the Court.

It is submitted that the entire article is harmonized internally and with the purposes of the parties if it be regarded as contemplating (1) that individual employee grievances be processed as provided in Sections 2 through 6, (2) that basic "differences" between the contracting parties be the subject of direct negotiation between author-

ized spokesmen for the principals (union and company) in the first instance, and (3) that both types of controversy ("grievances" in Section 6 being construed as comprehending the "differences" referred to in Section 1 as well as the "grievance" introduced in Section 2) are subject to arbitration as provided in Section 6.

The Markel decision is completely consistent with this view in that while specifically limiting recourse to arbitration to the party filing the grievance, the contractual language in *Markel* also specifically limited the application of the grievance procedure to those matters arising between "the company and any employee" rather than the much broader area of disputes arising between "the company and the union" or "the parties".

Appellants' position herein is not in any way inconsistent with this Court's decision in *Hoover Motor Express v. Teamsters Union Local 327, supra.* This Court, in that decision, raised the implication that the word "grievance" had taken on a certain general connotation, becoming at least in part, a word of art in the labor-management relations field. At most, however, this Court there may have intended to indicate that "grievance" would be given this meaning in the absence of any *other* guide to the meaning of the term as used in a contract between two parties. This view of *Hoover* is confirmed by this Court's subsequent decision in *NLRB v. Associated Machines, Inc.*, 219 F. 2d 433, (6 C.A. 1955). In that case this Court, in interpreting the word "grievance" [as used in Section 2(b) of the National Labor Relations Act, as amended, 29 USCA 152 (5)], gives it a very broad meaning. We believe the language of the contract herein provides ample evidence of the intention of the parties to the contract to use the word "grievance" as the equivalent of any "difference" that

might arise "between the company and the union as to the meaning and application of the agreement", a term we contend, broad enough to include the issues raised by appellee's complaint.[8]

As the 2nd Circuit's decision in *Signal-Stat* indicates, several cases involving the question of the issuance of a stay pending arbitration in causes of action based upon breaches of no-strike provisions of collective bargaining contracts have reached a result contrary to that reached in *Signal-Stat*. Several of these cases admit of an analysis similar to *Markel Products v. United Electrical Workers, supra*, in that they are based on an interpretation of the *specific language* of the collective bargaining contract in question which, in those cases, is much more limited in its application than the language of the contract herein. Also, as Judge Frank indicates, some cases reaching contrary results on contractual language not easily distinguishable from language of the type involved in both *Signal-Stat* and the instant case are, in the view of the Second Circuit, "erroneous".

We believe the case of *Colonial Hardwood Flooring Company v. United Workers*, 168 F. 2d 33 (4 C. A. 1938), one of the cases most frequently cited in this area of litigation, is illustrative of both points. (It should be noted again that this case is one of those cited by the Second Circuit for the statment that "to the extent that the cases

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[8] We believe our position on this point is strengthened by *Elgin J. and E. Ry. Co. v. Burley*, 325 U. S. 711, 65 Supreme Court 1276 (1945) cited by this Court in the Hoover decision, where the Court, in discussing the type of disputes which involve "grievance" states:

> "The second class, however, contemplates the existence of a collective agreement already concluded. * * * The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case."

cited by plaintiff require a contrary result we think them erroneous".) The *Colonial* case held, among other things, that a suit for a breach of a no-strike clause in a collective bargaining contract would not involve "any issues referable to arbitration" under the arbitration language of the particular contract. It is somewhat typical of many cases involving the question under consideration that the *Colonial* decision did not set forth the specific language of the arbitration clause upon which the decision on this point would necessarily have been based. In *Lewittes and Sons v. Furniture Workers, supra*, the Court, in discussing the *Colonial* case, clearly establishes the irrelevancy of that decision to cases involving language such as we have in the case at bar. The court points out that the contractual language in the *Colonial* case *specifically limited* the grievance and arbitration provisions to disputes involving "hours and other conditions of employment".

More important is the fact that the Colonial case initiated a general approach to the question of stays pending arbitration under collective bargaining contracts, since followed by other courts. Apart from consideration of the specific language of the contract involved, the Fourth Court of Appeals in Colonial held that arbitration clauses generally were not intended to cover actions involving breach of a no-strike clause, but, on the contrary, were intended to prevent such strikes. In view of the specific contract language under consideration in *Colonial*, these general comments were, at least in part, gratuitous. However, the Fourth Circuit's general approach to this problem has been considered by so many courts as to now have weight apart from the language of the particular contract upon which the case was based. We believe it was this general reasoning and attitude which Judge Frank condemned as "erroneous" and a restoration "by indirection * * * [of]

the same result as the old, and now generally rejected, judicial aversion to enforcing arbitration agreements".

It was this general attitude of the Fourth Circuit which was practically paraphrased, and then answered, by the District Court in *Pennsylvania Greyhound Lines v. Amalgamated Association of Motor Coach Employees*, 98 F. Supp. 789, 791. The Court there stated:

> "The plaintiff further contends that the matter involved in this action is not referable to arbitration for the reason that the grievance and arbitration procedure in the contract was intended to prevent strikes and lockouts and was not intended to be resorted to after a strike had occurred. The provisions of the contract in this respect are very broad. Section 2 of Article 1 of the contract includes 'all differences, disputes and grievances, other than discipline and discharge cases, hereinafter provided for, between the parties arising out or by virtue of the within collective labor agreement.' We believe this language is clear and unambiguous and does not admit of any explanation or limitation by parole evidence or otherwise. *Gianni v. R. Russel & Co.*, 1924, 281 Pa. 320, 128 A. 791. On the contrary, it seems clear to us that if the employer has occasion to resort to the grievance and arbitration machinery, it would very likely be in connection with a strike. We, therefore, hold that the case raises an 'issue referable to arbitration under an agreement in writing for such arbitration' within the terms of Section 3 of the United States Arbitration Act (at page 791)."

The Third Circuit reversed this decision on other grounds. But the Second Circuit in *Signal-Stat*, refers to it as one of those cases "with which we agree", and which "support our decision that this instant arbitration agreement covers a dispute arising from an alleged breach of the no-strike

clause". We may conclude that the Second Circuit approvingly adopts the "modern" approach to labor arbitration displayed by the District Court in *Pennsylvania Greyhound*.

Appellee, in earlier stages of this litigation, has advanced a number of arguments which, in effect, boil down to the proposition that the arbitration provision of the instant contract could not possibly apply to the issues involved in a suit for breach of the no-strike provision because the arbitration provision can only be applied to a grievance (or "differences * * * as to the meaning or application of this agreement") which has been processed through all steps of the grievance procedure preceding the final step which is arbitration. Since we anticipate appellee will advance this argument before this Court, we shall specifically consider it here. Such a proposition fails to take account of all of the language of the first six sections of Article III of the contract. It completely ignores, for example, the shift from the phrase "the grievance" utilized in the early stages of the grievance procedure (Sections 2-4 of Article III) to "any grievance" which appears in Section 5, the last stage of the grievance procedure prior to arbitration. The particular significance of this use of the term "any grievance" in Section 5 is highlighted by Section 2 of Article VI (Appendix 12a) which specifically provides for the immediate submission to a committee, analagous to that provided by Section 5 of the grievance procedure, (omitting anything analagous to the earlier stages of Sections 2-4) of any dispute involving the discharge, suspension or disciplinary layoff of any employee. Section 2 of Article VI does not, however, mention the grievance procedure, use the term "grievance", or, itself, specifically provide for submission of such a con-

troversy to arbitration. Yet, it could not be contended that such a dispute or difference between the parties involving, for example, the discharge of an employee would *not* be subject to arbitration under Art. III. But appellee's logic that only matters subject to *all* steps of the grievance procedure are arbitrable would compel such an absurd conclusion.

In fact, in the face of a grievance procedure which is intended to encompass all differences between the company and the union as to the meaning and application of the agreement, appellee's (expected) position is completely lacking in force. Any number of situations which might normally be assumed to be within the scope of the grievance procedure would necessarily be removed by this strained and limited construction. By way of example, Article II, Section 3 of the contract, (App. 13a) specifically permits an International representative to attend meetings between the plant bargaining committee and the company. If the employer refused to admit an International representative to such a meeting, would the union be compelled to acquiesce simply because it would not be possible for its complaint to be submitted pursuant to Section 2 of the grievance procedure which provides that "any employee having a grievance shall first submit the same to the steward of his department or to his foreman". If such a situation arose, and if the company's theory were followed through, would the company then concede that since its action in barring the International representative was not governed by the grievance and arbitration procedure, the union would be free to strike over such a minor dispute?[9]

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[9] In *N. L. R. B. v. Wagner Iron Works, et al.*, 220 F. 2d 126, 140 (C. A. 7, 1955); cert. denied 76 S. Ct. 466, 1956, the Seventh Circuit notes that a no-strike clause in a contract will normally not preclude a strike over a matter which is not within the scope of the arbitration provision of the same contract, a principle which would be particularly true here where the no-strike clause is, itself, merely a phrase in Section 1 of Article III of the contract, i. e. a part of the grievance procedure itself.

The same anomaly would result from a number of other situations involving small scale or day-to-day differences. Such situations include, for example, "differences * * * as to the meaning or application" of Sections 1 and 2 of Article II providing for representation of the union (through various committees, etc.) in administration of the contract, or differences arising under the union shop and check-off provisions of Article I (App. 8a-9a).

Such a limited construction of the grievance procedure would, in effect, render it inapplicable to a large variety of situations including, among others, substantially all instances where the *company* might wish to exercise the right of "either party" to submit a dispute to arbitration. As the District Court in *Pennsylvania Greyhound Lines v. Amalgamated Association of Motor Coach Employees, supra,* notes:

> "* * * On the contrary, it seems clear to us that if the employer had occasion to resort to the grievance and arbitration machinery it would very likely be in connection with a strike. * * *"

In a very recent decision of the New York Supreme Court, the Court, considering a position analogous to appellee's anticipated position here, in a case involving a request by a party for an order compelling arbitration, states:

> "Objection is made to the award in that the complete machinery of adjustment was not exhausted prior to demanding arbitration. The occasion of the dispute was whether respondent was, in fact, removing its plant from New York City to Oklahoma. The omission complained of was that this question was not first taken up on the shop steward level. Obviously, this objection lacks substance. Upon the question here involved, discussion on the level suggested would be less than a formality. The contract

must be read with that in mind and the obvious construction is that it does not require what would be useless." *In re Pocketbook Workers Union*, 149 N. Y. Supp. 256 (February 6, 1956).

In the case of *Wilson Bros. v. Textile Workers Union*, 132 F. Supp. 163 (D. C. N. Y. 1954) the contract language made the same contention as here anticipated much more plausible. The court, nevertheless, rejected it and ruled that this issue was one involving the arbitrator's jurisdiction and the meaning of the arbitration clause, and was, thus, a question of arbitrability which should properly be left, in the first instance, for decision by the arbitrator. This decision is consistent with, and in support of, our principal position set forth in the previous section of this brief to the effect that the issue of arbitrability of the alleged breach of contract should, itself, be left to the arbitrator for initial decision since it involves the issue of meaning and application of the contract, i.e., Article III thereof. In the *Wilson* case, the court states:

> "The parties made detailed contractual provisions for vacation pay in Section XVI of their contract. In Section V(A) they explicitly provided that '(a)ny difference, grievance, or dispute between the Company and the Union or any employee arising out of or relating to this agreement or its interpretation or enforcement shall be subject to' the grievance and arbitration procedure thereafter stated. * * *
>
> "Similarly, for the parties' dispute as to what was the applicable arbitration procedure. Whether under the circumstances here enumerated, e. g. the closing of the plant, termination of the agreement, the union could invoke Section V (F) of the contract and in the first instance enable its officers to deal directly with the officers of the employer, thereafter submitting the dispute to the American Arbitration

> Association, and thus by-pass a non-existent grievance machinery and fail to attempt to agree to an arbitrator pursuant to Section V (A) (Step 4) of the contract; or whether there was a mutual waiver of these provisions, are matters of contract interpretation which by the terms of the contract are rightly arbitrable issues, and not, at least at this stage of the dispute, for the courts."

In conclusion on this point, appellants contend that the language of the contract itself, as a matter of law, clearly contemplates that the issues involved in appellee's complaint are subject to arbitration as "differences * * * between the company and the union as to the meaning and application of this agreement".[10] Any other decision would necessarily disregard important parts of the grievance procedure, and, particularly, the language in Section 6 giving "either party" the right to submit a grievance (or difference as to the meaning and application of the agreement) to the arbitrator. General rules of contract construction, as in the case of statutory construction, dictate the advisability of presuming that the parties, inserting language in a contract, did not perform a useless act. The specific language permitting either party to submit a matter to arbitration cannot be disregarded in the face of the sharply drawn contrast, previously discussed, between *Signal-Stat Corporation v. U. E.*, 38 L. R. R. M. 2378 (2 C. A. July 2, 1956) and *Markel Electric Products v. United Electrical Workers*, 202 F. 2d 435 (C. A. 2 1953) (the former permitting *either* party to so submit and the latter permitting only

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[10] In fact, we contend that they are also submissible to the last stage of the grievance procedure set forth in Section 5 of Article III (which provides for submission to a group composed of "the shop committee and management"). However, in view of the prolonged nature of the instant dispute, appellants would be willing to agree with appellee that submission at Section 5 would be rather futile at this stage and it would be better to proceed directly to arbitration.

the party filing to submit). If the contract herein provided, as did that involved in the *Markel* decision, only that the party filing the grievance might submit the same to arbitration, it might well be that appellee's anticipated position would be well taken (though even in *Markel,* there was a very strongly worded dissent by Judge Clark). *The main point is that the contractual language herein on the vital points is closely akin to the language involved in Signal-Stat and not to that involved in Markel.*

Appellants contend that this Court, in accord with the Second Circuit, should, give due regard to the present day broad view of arbitration, reverse the District Court and approve the issuance of a stay in the proceedings herein. We respectfully suggest for the Court's consideration the language of a recent New Jersey Superior Court decision discussing, generally, the merits of a liberal construction of arbitration provisions in contracts. The case incidentally, involved a suit by a union to compel an employer to proceed to arbitration in accordance with the provisions of a collective bargaining agreement. In that case, *Standard Oil Union v. Esso Corporation,* 118 A. 2 70 (N. J. Superior Court, Appellate Division, 1955), the Court states, in part:

> "The function of the courts is to determine whether there is a bona fide dispute as to meaning: The purpose of interpretation is to discover meaning. If the significance of the language is clear, then the allegation of a contrary meaning is frivolous and without legal consequence. On the other hand, if the language employed is reasonably susceptible of more than one import or if certain sections of the agreement may be said reasonably to be ambiguous when considered in relation to each other, or if it is fairly arguable that clauses apparently

pertaining to the same subject matter are in conflict, then the dispute must be referred to arbitration.

"A further word of caution and explanation should be said as to the nature of the judicial intervention. The reluctance of the courts to sanction the arbitration process is a relic of the past. Now it is recognized as an integral part of our economic life and welcomed as a practical and expeditious means of disposition of industrial disputes. Consequently, when an agreement has been made between management and labor for the regulation of wages, hours and conditions of employment, and as an incident thereof they have stipulated to resort to arbitration in the event of dispute as to the interpretation of language employed therein, the judiciary will study the nature of the dispute with the utmost liberality and freely exercise the power authorized by the Legislature (*N. J. S. 2 A:24-3, N. J. S. A. supra*) to compel arbitration in order to effectuate the practical purpose of the signatories.

"It is not our intention to express the view that before the parties will be ordered to the forum of arbitration, the judicial mind must find merit in an asserted interpretation. The test being expounded is that arbitration will be directed when it appears to the mind of the ordinary layman that the particular language involved is reasonably open to the connotation contended for. If the contention proposed is such that no ordinary layman, acting in good faith, would seriously advance it, then our statutory power will not be exercised."

On the specific issue before it, the Superior Court affirmed the lower court decision ordering the employer to proceed to arbitration.

Judicial attitude toward arbitration is, we believe, an important element in the decision of this case. We respectfully urge that this Court reject the outmoded ap-

proach of judicial hostility and adopt the modern view represented by the Second Circuit's decision in the *Signal-Stat* case. Recognition of the spirit and purpose, as well as the letter, of the Federal Arbitration Act weighs heavily in favor of such an approach, and, necessarily, in support of the result we seek.

The Congress, by enacting the Federal Arbitration Act, Title 9 U. S. C. A., gave evidence of its general approval of arbitration as a desirable manner for the adjustment of contract disputes. When that Act was originally passed in 1925, it completely reversed the adverse judicial climate with regard to arbitration agreements and placed those agreements on the same footing as other contracts. See Sturges and Murphy, *Some Confusing Problems Relating to Arbitration Under the United States Arbitration Act*, 17 Law and Contemporary Problems 580.

In view of Congressional recognition of the value and legality of arbitration agreements, and in view of the particular desirability and widespread use of such agreements in the area of labor management relations, arbitration would appear to be particularly appropriate in the circumstances in this case. The position of appellee amounts to a contention that this Court should revert to the original and thoroughly discredited judicial position on arbitration clauses insofar as collective bargaining agreements are concerned. It would be difficult to think of a position which would be more out of keeping with the legislative and judicial recognition given to arbitration clauses in recent years. This is particularly true in view of the Congressional policy in the area of labor management relations as expressed in the Labor Management Relations Act of 1947 which favors private adjustment of labor disputes. Denial of the instant motion to stay would tend to undermine and destroy the system of

orderly labor management relations developed by liberal use of arbitration clauses, and would, to a large extent, defeat the Congressional purpose in the area of labor management relations.

The atmosphere in which, we contend, the Court should decide this alternative issue of the stay pending arbitration, is succinctly set forth in the quotation from the famous English case of *Heyman v. Darwins* (1942) A. C. 356, contained in the Second Court of Appeals decision in *In Re Pahlberg's Petition,* 131 F. 2d 968, (C. A. 2, 1942) where it is stated:

> "An arbitrartion clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void. But, in a situation where the parties are at one in asserting that they entered into a binding contract, *but a difference has arisen between them whether there has been a breach by one side or the other, or whether the circumstances which have discharged one or both parties from further performance,* such differences should be regarded as differences which have arisen 'in respect of,' or 'with regard to,' or 'under' the contract, and an arbitration clause which uses these, or similar expressions should be construed accordingly." (Emphasis supplied.)

RELIEF

Therefore, it is respectfully submitted that this Honorable Court reverse the holding of the Court below insofar as that Court refused to order a stay of proceedings pending arbitration, and, pursuant to Section 3 of the United States Arbitration Act, Title 9 U. S. C., remand this action to the District Court with direction to enter an order staying all further proceedings until the question of the arbitrability of the issues raised by the complaint herein has been submitted to an arbitrator and until such issues have been arbitrated, in the event the arbitrator rules they are arbitrable; or, in the alternative an order adjudicating the arbitrability, as a matter of law, of the issues raised by the complaint herein, and staying all further proceedings until those issues have been submitted to, and determined by, an arbitrator pursuant to the provisions of the collective bargaining contract pleaded herein as part of the complaint.

Respectfully submitted,

REDMOND H. ROCHE, JR.,
Attorney for Appellants,
8000 E. Jefferson,
Detroit 14, Michigan.

HAROLD A. CRANEFIELD,
Of Counsel,
8000 E. Jefferson,
Detroit 14, Michigan.

APPENDIX

RELEVANT DOCKET ENTRIES

1952	
June 24.	Complaint filed.
July 18.	Appearance by defendants filed.
1953	
May 2.	Filed motion for leave to file amended and supplemental complaint.
May 13.	Filed stipulation for plaintiff to file amended and supplemental complaint.
May 13.	Filed order granting leave to file amended complaint.
May 13.	Amended and supplemental complaint for damages filed.
June 3.	Filed motion of defendants to dismiss the action or in the alternative to stay proceedings, affidavit in support of motion and proof of service.
1954	
Dec. 2.	Hearing on defendants' motion to dismiss.
1955	
Jan. 3.	Filed motion to amend defendants' pending motion to dismiss.
1956	
May 31.	Filed opinion of court in re motions.
May 31.	Orders entered denying motion to dismiss; denying motion to stay proceedings; granting motion to vacate the notice of taking of deposition of the International Union and the local union; denying motion to quash subpoenas. Attorneys notified of entry of said orders.

June 7. Filed defendants' motion to continue time in which defendants may answer complaint.

June 7. Filed affidavit of service of motion to continue time in which defendants may answer plaintiff's complaint.

June 14. Filed notice of appeal and bond on appeal.

June 15. Mailed copies of notice of appeal to Elden W. Butzbaugh and Vedder, Price, Kaufman & Kammholz, attorneys for plaintiff.

June 15. Mailed record on appeal to U. S. Circuit Court of Appeals.

AMENDED AND SUPPLEMENTAL COMPLAINT

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Benton Harbor Malleable Industries, a corporation, Plaintiff, vs. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), a labor organization, and Benton Harbor Malleable Local No. 880 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), a labor organization, Defendants.	Civil Action No. 2077.

AMENDED AND SUPPLEMENTAL COMPLAINT FOR DAMAGES

Comes now Benton Harbor Malleable Industries, a corporation, plaintiff in the above entitled cause, and complains of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-

CIO), a labor organization, and Benton Harbor Malleable Local No. 880 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), a labor organization, defendants herein, and each of them and alleges:

1. This is a suit for violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce within the meaning of Section 301 (a) of the Labor Managament Relations Act, 1947, as amended, hereinafter referred to as "The Act". The jurisdiction of this Court is based upon said Section 301 of "The Act".

2. Plaintiff is a corporation duly organized and existing under the laws of the State of Michigan and having its principal offices in Benton Harbor, Michigan.

3. Plaintiff is an employer engaged in the operation of malleable, grey iron and die casting foundries in the Western District of Michigan, Southern Division, and in the course and conduct of its business uses materials and items delivered and transported in interstate commerce from and through various states of the United States, and ships and delivers its finished products in interstate commerce to and through various states of the United States other than the State of Michigan and plaintiff has been at all times referred to herein and is now engaged in an industry affecting commerce as defined in "The Act".

4. In the course and conduct of its business as aforesaid plaintiff operates, in the Western District of Michigan, Southern Division, four plants known as Plant Nos. 1, 2, 3 and 5, Plant No. 1 is a malleable foundry, Plant No. 2 a machine processing division, Plant No. 3 a die casting division and Plant No. 5 a grey iron foundry.

5. Defendant, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), is an unincorporated association and is a labor organization which represents employees of plaintiff in an industry affecting commerce as defined in "The Act" in the Western District of Michigan, Southern Division.

6. Defendant, Benton Harbor Malleable Local No. 880 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), is an unincorporated association and is a labor organization which represents employees of plaintiff in an industry affecting commerce as defined in "The Act" in the Western District of Michigan, Southern Division.

7. Duly authorized officers or agents of defendants, and each of them at all times hereinafter mentioned, have been and are now engaged in representing or acting for employee members in the Western District of Michigan, Southern Division.

8. On, to-wit, February 26, 1952, plaintiff, as an employer, and defendants, as labor organizations representing employees in an industry conducted by plaintiff in the Western District of Michigan, Southern Division, affecting commerce as defined in "The Act", made and entered into a certain contract and agreement in writing covering wages, hours of work, conditions of employment, the method of adjusting alleged grievances and other matters with respect to the aforesaid employees. A copy of said agreement is attached hereto as Exhibit "A" and made a part hereof. Said agreement has, since the date thereof, and is now in full force and effect and will, unless terminated in accordance with the terms and conditions thereof, remain in full force and effect until February 26, 1955, and from year to year thereafter.

9. Said agreement between plaintiff and defendants on behalf of their officers, agents and members was executed for the benefit of defendants and their members and the benefits thereof were accepted by them and each of them.

10. Plaintiff has at all times fully performed and complied with the terms and conditions of said agreement.

11. The aforesaid agreement expressly provides in Article III, Paragraph 1, thereof as follows:

> "1. Shall difference arise between the Company and the Union as to the meaning and application of this Agreement, or should any local trouble arise, an earnest effort shall be made to settle such differences, and it is agreed by the Union that there shall be no strike,

slowdown or stoppage of work on the part of the Union or its members and there shall be no lockout on the part of the Company during the term of this contract. The parties shall in all instances resort to the following steps of the grievance procedure."

12. Notwithstanding the aforesaid agreement and in violation thereof and without exhausting the procedure provided in the aforesaid agreement for the settlement of grievances, the following acts and things have been committed and done:

a. On, to wit, June 18, 1952, at 1:30 o'clock P. M. there occurred a strike and stoppage of work by employees represented by defendants at plaintiff's aforesaid plant No. 1. All of the employees of said plant discontinued work at said time and date, except employees working in and around the furnaces of said plant, which employees ran out the iron in said plant and thereupon likewise discontinued work. Since the time of discontinuance of work in said plant on June 18, 1952, all of the employees of said plant represented by defendants have participated in the aforesaid strike and stoppage of work and continued so to do until June 25, 1952.

b. On, to wit, June 18, 1952, there occurred a strike and stoppage of work at plaintiff's aforesaid Plant No. 2. All of the employees of said plant represented by defendants discontinued work on said date, except employees of the tool and die division of said plant. Said employees of the tool and die division of said plant continued working on June 18, 1952, and thereafter discontinued work. Since said discontinuance of work, all of the employees of plaintiff's Plant No. 2 represented by defendants have participated in the aforesaid strike and stoppage of work and continued so to do until June 25, 1952.

c. On, to wit, June 19, 1952, there occurred a strike and stoppage of work by employees of plaintiff represented by defendants at plaintiff's Plants Nos. 3 and 5. All of the employees of plaintiff represented by defend-

ants participated in said strike and stoppage of work and continued so to do until June 25, 1952.

d. On, to wit, March 20, 1952, there occurred a strike and stoppage of work by employees represented by defendants at all of plaintiff's Plants Nos. 1, 2, 3 and 5 aforesaid. All of the employees of plaintiff represented by defendants participated in said strike and stoppage of work, which continued for two days, to wit, March 20 and 21, 1952, which said stoppage of work completely shut down plaintiff's said four plants during said two days.

e. On, to wit, April 27, 1953, at midnight, there occurred a strike and stoppage of work by employees represented by defendants at all of plaintiff's Plants Nos. 1, 2, 3 and 5 aforesaid. Substantially all of the employees of plaintiff represented by defendants participated in said strike and stoppage of work and continue so to do. As a result of said strike and stoppage of work the plaintiff's operations and production have been completely stopped.

13. Defendants and the officers, agents and representatives of defendants have caused, authorized, instigated, aided and condoned the aforesaid strikes and stoppages of work.

14. All of said strikes and stoppages of work and the said acts of the defendants and the officers, agents and representatives of defendants were and are in violation of the aforesaid agreement and the defendants and their offices, agents, representatives and members have breached said agreement.

15. The business and activities of plaintiff involved in the aforesaid strikes and stoppages of work are business and activities which affect commerce as defined in "The Act" and the employees who have engaged and are now engaging in any of the aforesaid strikes and stoppages of work are employees in an industry affecting commerce as defined by said "Act".

16. The aforesaid strike and stoppage of work which occurred on April 27, 1953, and which continues, has rendered plaintiff unable to fill orders of its customers; has caused plaintiff to lose valuable orders and contracts from which plaintiff would have made substantial profits, has destroyed the confidence of plaintiff's customers in plaintiff's ability to produce and deliver merchandise, and has virtually destroyed plaintiff's business. Unless said unlawful strike in violation of said agreement terminates immediately, it is probable that said strike has already or will cause the complete destruction of plaintiff, as a business enterprise and that plaintiff will, as a result, have its business and operations terminated completely and permanently, for all of which plaintiff claims damages. As a result of all the aforesaid acts and the aforesaid violations of said agreement, plaintiff has sustained and in the future will sustain injury and damage including the loss of the value of products and items of commerce which otherwise would have been or would be produced at the aforesaid plants, the loss of profits reasonably to be anticipated by plaintiff upon the sale of such products, damage to materials and equipment in said plants and the loss of good will as a result of the inability of plaintiff to furnish products of said plants to its customers to the damage of plaintiff in the sum of Six Million Dollars ($6,000,000).

Wherefore, plaintiff prays judgment against defendants for the sum of Six Million Dollars ($6,000,000) and for its cost herein incurred.

Plaintiff demands a trial by jury.

Benton Harbor Malleable Industries,

By Elden W. Butzbaugh,
Attorney for Plaintiff Herein.

Elden Butzbaugh,
172 East Main Street,
Benton Harbor, Michigan,
Attorney for Plaintiff.

Vedder, Price, Kaufman & Kammholz,
105 South LaSalle Street,
Chicago 3, Illinois,
Of Counsel:

PORTIONS OF EXHIBIT A TO AMENDED AND SUPPLEMENTAL COMPLAINT

(Collective Bargaining Agreement of February 26, 1952)

AGREEMENT

This Agreement made and entered into this 26th day of February, 1952, between Benton Harbor Malleable Industries of Benton Harbor, Michigan (hereinafter referred to as the "Company"), and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), Benton Harbor Malleable Local No. 880, Benton Harbor, Michigan (hereinafter referred to as the "Union").

Witnesseth, That

Whereas, it is the general purpose of the Agreement to promote and improve the industrial and economic relationship between the Company and its employees and set forth the basic agreement covering rates of pay, hours of work and conditions of employment to be observed by the parties hereto, which shall apply to all employees covered by this agreement without discrimination on account of race, color, national origin or creed.

Article I

1. The Company agrees to recognize the Union as the exclusive collective bargaining agency for all hourly paid or rated employees of the Company, except the supervisory employees designated by the Company, time-study men, office and plant control employees. The Company agrees to furnish the Union with a list of superintendents, foremen, and other supervisory employees and to notify the Union of any changes by posting notices thereof on the bulletin board in the department wherein such change occurred.

2. By virtue of Union compliances with the requirements of Section 8 (a) (3) of the Labor Management Relations

Act of 1947, as amended, it is agreed that: All employees covered by this Agreement shall, as a condition of employment, become members of the Union in good standing, thirty days following the beginning of such employment, or the effective date of this Agreement, whichever is the later and shall continue to remain members in good standing during the term of this Agreement. For the purpose of this Agreement "good standing" shall be that defined in the Constitution and By-Laws of the Union, subject to any applicable provisions of the Law.

3. The Company will deduct from the wages of the employees and turn over to the Financial Secretary of the Union the initiation fees, Union dues, and assessments of such members of the Union as individually and voluntarily certify in writing that they authorize such deductions. Such authorizations shall apply for the duration of this contract. Such deductions will be made from the first pay check due to such employees each month and the funds so deducted will be remitted by the Company on or before the 15th day of that month.

Article II

Representation

1. For the purpose of collective bargaining the Union will be represented by a Shop Committee of nine (9) members, all of whom shall be employed by the Company.

2. The Company agrees to recognize duly designated members of the Union as stewards, not to exceed 25 in number. In the event shifts are added, a reasonable number of additional stewards may be designated. The Union agrees to keep the Company advised of any changes in its steward lists.

3. The Local 880 Bargaining Committee shall have the right to have an International representative and recording secretary present at any meeting.

4. Members of the Shop Committee, not to exceed two at a time, may enter the shop at any time to investigate

grievances that are pending provided they have applied for a proper pass. It is agreed that this privilege will not be abused by the Union nor will management deny such privilege when proper reason is given.

Article III

Grievance Procedure

1. Shall difference arise between the Company and the Union as to the meaning and application of this Agreement, or should any local trouble arise, an earnest effort shall be made to settle such differences, and it is agreed by the Union that there shall be no strike, slowdown or stoppage of work on the part of the Union or its members and there shall be no lockout on the part of the Company during the term of this contract. The parties shall in all instances resort to the following steps of the grievance procedure.

2. Any employe having a grievance shall first submit the same to the steward of his department or to his foreman. In the event the grievance is submitted to the department steward he shall negotiate the grievance with the foreman of the department.

3. If a satisfactory agreement cannot be reached promptly by the foreman and the steward the grievance shall be reduced to writing and referred to the committeeman of the division involved and the divisional superintendent or the designated representative of management as the case may be.

4. If the unsettled grievance pertains to a disputed rate and the Superitendent and Committeeman are unable to arbitrarily satisfy the grievance a joint time study will be taken immediately (within the next eight (8) working hours of the shift whereon the grievance arose). If the joint time study fails to satisfy the grievance, the matter shall be referred to the Shop Committee and Management wherein disposition is outlined in Section 5 of this Article.

5. If any grievance cannot be settled between the divisional superintendent or designated representative of Man-

agement and the Committeeman, within two working days, it shall be referred to the Shop Committee and Management for disposition.

6. In the event any grievance relating to the meaning or application of this Agreement is not satisfactorily disposed of in the foregoing steps of the grievance procedure, either party may submit the unsettled grievance to an impartial arbitrator agreed upon by them, provided notice is given to the opposite party within fifteen (15) days after the Shop Committee-Management meeting (above referred to) of intention to arbitrate. The parties shall bear equally the expenses of arbitration. The Arbitrator shall have no power to add to, ignore or modify any terms of this Agreement. His decision shall be final and binding upon both parties to this Agreement.

7. The Shop Committee, and Management or its representatives will meet on the first and third Wednesdays of each month for the purpose of settling grievances, the meetings to commence at 9:00 A. M. Any grievances presented at any meeting which cannot be settled at that meeting, shall receive a final answer by either the Shop Committee or Management at the following grievance meeting.

8. In the event of an emergency, a special meeting between the Shop Committee and Management may be called. A special meeting can be held only upon agreement between the Shop Committee and Management when the same is necessary.

9. Each representative of the Union, officially designated and recognized by this Agreement, who loses time during his working hours in handling grievances in the manner provided in this Agreement shall receive pay for such lost time on the following basis: If he is a piece worker, on the basis of his average straight time piecework earnings for the week, and if he is a day worker, on the basis of his day-work rate for the week. Time lost for handling grievances shall be allowed only if the Union representative presents a Grievance Time Slip signed by the foreman or the supervisor of that department in which the Union representative works and by the foreman or super-

visor of the department in which the grievance has occurred, this slip to indicate accurately the period of time lost. The Union representative engaged in processing a grievance shall notify the foreman or supervisor of that particular department of the nature of the grievance. In the event a foreman or supervisor refuses to sign a Grievance Time Slip, he shall state in writing on the slip, his reason for refusing to sign. It is the intention of the parties to keep grievance time at a minimum and all unnecessary grievance time, including "doubling" of Union representatives on grievance investigation or processing shall be avoided.

10. Any written grievance presented under this Article affecting the earnings of an employee shall be retroactive to the date of the filing of this grievance, and the effective date will be certified mutually by the Superintendent and Committeeman who participated.

Article VI

Discharges

1. Any employee discharged, suspended, or given a disciplinary lay-off while working, shall be given not to exceed fifteen minutes to confer with his steward or committeeman before leaving the shop.

2. Any employee discharged, suspended or given a disciplinary lay-off may appeal his case in writing within twenty-four (24) hours after such discharge, suspension or disciplinary lay-off. A meeting of the management, Shop Committee, and the employee will be held within the next forty-eight (48) hours after notification to the employment department, exclusive of Saturdays, Sundays, or holidays, unless the Company and the Union agree upon some other time. If it is found that the employee was wrongfully discharged or disciplined, the employee will receive his average rate of compensation during the week prior to the week in which the disciplinary action was taken; if the employee fails to appear at the hearing, his discharge, suspension or disciplinary lay-off will be considered absolute.

3. No employee borrowed or temporarily transferred from his regular department will be discharged during the time of such transfer, but will be returned to his regular department for final disposition or discipline action pending against him.

Article XI

Terminations

1. This contract shall continue in full force and effect until February 26, 1955 and from year to year thereafter upon the same terms and conditions herein set forth, unless at least sixty (60) days prior to the expiration of any contract period either party shall give to the other written notice of its desire to modify or amend or terminate this Agreement. Failing mutual agreement on such issue the parties may thereupon, notwithstanding any of the other provisions of this Agreement respectively resort to strike or lockout in support of their contentions.

2. This Agreement may be amended by mutual consent of the parties hereto prior to its expiration date.

3. Any notice to be given under this Article shall be given by registered mail, and if given by the Company shall be addressed to the Union at P. O. Box 83, Benton Harbor, Michigan, and if given by the Union shall be addressed to the Benton Harbor Malleable Industries, Benton Harbor, Michigan. Either party may by written notice change the address to which notices to it under this Article shall be sent.

SUPPLEMENT TO COLLECTIVE BARGAINING AGREEMENT OF FEBRUARY 26, 1952, DATED FEBRUARY 29, 1952

This Agreement made and entered into this 29th day of February, 1952, between Benton Harbor Malleable Industries of Benton Harbor, Michigan (hereinafter referred to as the "Company"), and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), Benton Harbor Malleable Local No. 880, Benton Harbor, Michigan (hereinafter referred to as the "Union").

Witnesseth, That

Whereas, In the negotiation of the 1952 Labor Management Contract between the Company and the Union it was agreed that the Union will be permitted to re-open the Labor Contract on February 27th, 1953 for the sole purpose of negotiating a Pension Plan or form thereof. The Company and the Union agree to terminate this re-opener within sixty (60) days from February 27th, 1953 by any one of the three following alternatives:

(1) Form some plan acceptable to the parties to the Contract.

(2) A postponement until February 27th, 1954 with these same privileges for the sole purpose of negotiating a form of Pension Plan, or

(3) The right to strike due to the Company's failure to negotiate a Pension Plan even though its financial position was improved over that of February 27th, 1952.

It is agreed that the Union will have this same elective right to re-open (solely for the same reason) during the same calendar period in the following years under the same conditions.

It is agreed that this supplemental Contract is not a commitment guaranteeing a Pension Plan, but rather a Contract authorizing the Union's rights in negotiating a plan and abridging those rights so that the Contract cannot be re-opened for any other reason than that which is stipulated.

International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO) Local No. 880

/s/ William Gaines
W. N. Gaines, President

/s/ Joseph Vega
Joseph Vega,
Int'l Representative

Benton Harbor Malleable Industries, Inc., for its Directors (By Official Appointment of its President, Mr. C. E. Schultz and its Vice President, Mr. O. C. Schultz)

/s/ C. E. Schultz
C. E. Schultz, President

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY WITH SUPPORTING AFFIDAVIT

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Benton Harbor Malleable Industries, a corporation, Plaintiff, vs. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), a labor organization, and Benton Harbor Malleable Local No. 880 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), a labor organization, Defendants.	Civil Action No. 2077.

MOTION OF DEFENDANTS TO DISMISS THE ACTION OR, IN THE ALTERNATIVE, TO STAY PROCEEDINGS

Defendants move this Court as follows:

1. To dismiss the action because the complaint as amended and supplemented fails to state a claim against the defendants or either of them upon which relief can be granted.

2. To dismiss the action on the ground that this Court is without jurisdiction over the subject matter of the action because Section 301 (a) of the Labor Management Relations Act, 1947, as amended, (29 U. S. C. A. Section 185) upon which plaintiff exclusively relies to establish the jurisdiction of this Court is unconstitutional in that it pur-

ports to extend the jurisdiction of this Court beyond the limitations prescribed by Article III of the Constitution of the United States.

In the alternative, and only in the event that this Court shall deny the above and foregoing motions, defendants move the Court, as follows:

3. To stay the proceedings in this action until arbirtation of the of the matters complained of by plaintiff shall have been had, on the ground that the complaint tenders only issues which are referable to arbitration under an agreement in writing between the plaintiff and the defendants and that no such arbitration has been had in accordance with the terms of the agreement nor has plaintiff sought such arbitration as more fully appears in the affidavit of James Morgan, attached hereto and made a part hereof and marked Exhibit "A". This motion is founded on The United States Arbitration Act, 43 Stat. 886; 9 U. S. C. A. Section 3.

Defendants respectfully request oral argument before this Honorable Court upon the issues raised by this pleading.

Harold A. Cranefield,
Attorney for Defendants,
8000 E. Jefferson,
Detroit 14, Michigan.

To: Elden Butzbaugh, Esquire,
Attorney for Plaintiff.

Please take notice that the undersigned will bring the above motion on for hearing before this Court at Room 228, Federal Building, in the City of Grand Rapids, Michigan on the nineteenth day of June, 1953 at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Harold A. Cranefield,
Attorney for Defendants,
8000 E. Jefferson,
Detroit 14, Michigan.

EXHIBIT A

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Benton Harbor Malleable Industries, a corporation; Plaintiff, vs. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), a labor organization, and Benton Harbor Malleable Local No. 880 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), a labor organization, Defendants.	Civil Action No. 2077.

AFFIDAVIT IN SUPPORT OF MOTION TO STAY PROCEEDINGS

State of Michigan,
County of Wayne—ss.

James Morgan, being first duly sworn, on oath, deposes and says that:

1. He is employed by the above-named defendant International Union, United Automobile Aircraft and Agricultral Implement Workers of America, UAW-CIO, as Assistant Director of Region 1-B.

2. That Region 1-B is a geographical district established under the constitution of the said International Union for administrative purposes and that all transactions and relationships between the International Union and constituent local unions located within any such geo-

graphical district are conducted through the office of the Regional Director of such district who is ex-officio a member of the International Executive Board of the said International Union.

3. That the above-named defendant, Local No. 880, is situated within the said Region 1-B.

4. That by virtue of his employment as Assistant Regional Director of the said Region 1-B at all times mentioned in the complaint in this action, he is and has been, familiar with the contract or agreement between the plaintiff and the defendants in this action mentioned in the complaint and with all the transactions mentioned in said complaint and generally with the relationship between plaintiff and defendant labor organizations.

5. That the agreement mentioned and described in the complaint in this action provides in Article III, paragraph 6, thereof, as follows:

> "6. In the event any grievance relating to the meaning or application of this Agreement is not satisfactorily disposed of in the foregoing steps of the grievance procedure, either party may submit the unsettled grievance to an impartial arbitrator agreed upon by them, provided notice is given to the opposite party within fifteen (15) days after the Shop Committee-Management meeting (above referred to) of intention to arbitrate. The parties shall bear equally the expenses of arbitration. The Arbitrator shall have no power to add to, ignore or modify any terms of this Agreement. His decision shall be final and binding upon both parties of this Agreement."

6. That the plaintiff, Benton Harbor Malleable Industries, did not at any time prior to service of the summons and complaint in this action nor at any time since give a notice to the defendant International Union of intention to arbitrate a grievance based upon its contention as set forth in the complaint in this action that alleged strikes or stoppages of work on the occasions set forth

and described in Paragraph 12 of the complaint were in violation of the aforesaid contract or agreement.

7. Upon information and belief that the plaintiff, Benton Harbor Malleable Industries, did not at any time prior to the service of summons and complaint in this action nor at any time since, give notice to the defendant Local No. 880 of intention to arbitrate a grievance based upon its contention as set forth in the complaint in this action that alleged strikes or stoppages of work on the occasions set forth and described in Paragraph 12 of the complaint were in violation of the aforesaid contract or agreement.

James A. Morgan.

Subscribed and sworn to before me, this 2d day of June, 1953.

Louise Sarafian,
Notary Public, Wayne County, Michigan.
My commission expires: June 8, 1956.

OPINION OF THE DISTRICT COURT

UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Benton Harbor Malleable Industries, a corporation, Plaintiff, vs. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America et al., Defendants.	Civil Action No. 2077.

OPINION

Plaintiff employer has instituted this action for damages against the defendant union under §301(a) of the Labor Management Relation Act of 1947 (29 U. S. C. A. §185(2)).

The action was commenced by the plaintiff company seeking to recover damages against the defendant Union alleged to have been caused by a series of illegal strikes or work stoppages by the defendant Union and its membership.

Defendant has filed a motion to dismiss the action and in the alternative a motion to stay all proceedings until arbitration can be had under the terms of the collective bargaining agreement. Defendant has also filed a motion to vacate the notice of taking of depositions and to quash the subpoenas. The motion to dismiss has been substantially amended since the hearing on the original motion and alleges as a separate ground for dismissal of the action as to the International Union the theory that the International Union was not a party to the collective bargaining agreement. The motion to dismiss was originally based upon the grounds, first, that the complaint fails to state a claim upon which relief can be granted, and second, that the court is without jurisdiction to hear the complaint because §301(a) of the Labor Management Relations Act of 1947 is unconstitutional, in that it purports to extend the jurisdiction of the court beyond the limits of jurisdiction prescribed by Article III of the Constitution of the United States.

The Court has been unable to find any authority in the United States Supreme Court in regard to the constitutionality of §301. The matter has been before the Courts of Appeal and in each instance §301(a) has been found to be constitutional. Union Electrical R & M Workers v. Oliver Corp., 205 F. 2d 371 (8 Cir. 1953); Shirley-Herman Co. v. International Hod Carriers, 192 F 2d 806, (2 Cir. 1950); International Union United Furniture Workers of America v. Colonial Hardwood Flooring Co., 168 F. 2d 33, and see also Hamilton Foundry & M. Co. v. International M & F Workers, (6 Cir. 1951) 193 F. 2d 209, and International Union of Op-Eng. v. Daulen Const. Co., (6 Cir. 1951) 193 F. 2d 470.

Recently this matter has been before the United States Court of Appeals for the First Circuit in International

Brotherhood etc. v. W. L. Mead, Inc., 230 F. 2d 576. In that action the Court speaking through Chief Judge Magruder said at p. 579:

> "Of course, the basic constitutionality of the National Labor Relations Act, as an exercise of the commerce power, is beyond question. N. L. R. B. v. Jones & Laughlin Steel Corp. 1937, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893; N. L. R. B. v. Fainblatt, 1939, 306 U. S. 601, 59 S. Ct. 668, 83 L. Ed. 1014."

The Court further said at p. 580:

> "It is well established that there is some power in Congress to confer upon the federal courts what has occasionally been called a 'protective jurisdiction', where resolution of the controversy which the federal courts must thereby determine requires the application of state law—either statutory or common law."

And at p. 581:

> "It may be a matter of dispute how far this power to prescribe a 'protective' federal jurisdiction extends. We shall not now attempt to probe its outer limits, for we are more than satisfied that the constitutional power is at least broad enough to cover the situation now before us. Here the jurisdiction conferred by §301(a) relates to a subject matter which Congress undoubtedly has power to regulate under Art. I of the Constitution (commerce clause). Not only that, but the Congress has actually exercised this regulatory power by the passage of comprehensive enactments, to wit, the National Labor Relations Act, as amended, and the other provisions of the Taft Hartley Act—which enactments do, in important respects, prescribe as a matter of federal law the rules to be applied in §301 cases. If Congress, instead of exercising its power to the full, has chosen (as well may be the fact, though it seems we do not need to decide the point in this case) to leave certain rules in §301 liti-

gation to be ascertained and applied in accordance with state law, that is a matter of policy clearly within the legislative competence. See the discussion by Judge Wyzanski in Textile Workers Union v. American Thread Co., D. C. Mass. 1953, 113 F. Supp. 137. See also Textile Workers Union v. Arista Mills Co., 4 Cir., 1951, 193 F. 2d 529, 533; Wechsler, 'Federal Jurisdiction and the Revision of the Judicial Code,' 13 Law & Contemp. Prob. 216, 224 (1948); Mishkin, 'The Federal "Question" in the District Courts,' 53 Col. L. Rev. 157 (1953); Wollett and Wellington, 'Federalism and Breach of the Labor Agreement,' 7 Stanford L. Rev. 445, 475-79 (1955)."

This Court is in agreement with the decision of Chief Judge Magruder, and has concluded after reading the cited opinion, as it had prior to that time, that §301(a) is constitutional.

The second principal question is whether the court should stay the instant proceeding pending arbitration. This involves the issue as to whether the collective bargaining agreement is a "contract of employment" within the meaning of the Arbitration Act. 9 U. S. C. A. §1 et seq. and further whether there is an arbitrative question under the contract if it is not a "contract of employment." The decisions are not in accord. United E. R. & M. Workers v. Miller Metal Products, Inc., (4 Cir. 1954) 215 F. 2d 221; Pennsylvania Greyhound Lines, Inc v. Amalgamated Ass'n. of Street Electric Ry., and Motor Coach Workers of America et al. (3 Cir. 1952) 193 F. 2d 327.

This question has now been settled conclusively for the Sixth Circuit in Hoover Motor Express v. Teamsters, Chauffeurs, etc., Local Union No. 327, (6 Cir. 1954) 217 F. 2d 221; Pennsylvania Greyhound Lines, Inc. v. Amalga- the union for breach of no-strike clause in a collective bargaining agreement that the agreement is not a contract of employment.

The court distinguished its decision in Gatliff Coal Co. v. Cox, (6 Cir. 1944) 142 F. 2d 876.

It should also be pointed out that in the Hoover Motor Express Co. supra, there was no suggestion by the court that there was a failure to state a claim upon which relief could be granted. Defendants contend, however, that regardless of the application of the Arbitration Act they are entitled to have the present dispute submitted to arbitration under the provisions of the collective bargaining agreement. The arbitration section of that agreement is §6 of Art. III. It is the final step of the grievance procedure and provides:

> "In the event any grievance relating to the meaning or application of this agreement is not satisfactorily disposed of in the foregoing steps of the grievance procedure, either party may submit the unsettled grievance to an impartial arbitrator * * *."

Similar contracts have been held to present no arbitrable disputes or questions. Square D Company v. U. E. W., 123 F. S. 776, (E. D. Mich. 1954), held that no arbitrable question was presented on which defendants' motion for stay of proceedings could be upheld because the contract did not contemplate arbitration of the strike there involved.

The court concluded that this was demonstrated by the collective bargaining agreement, wherein the arbitration provision was but the final step in the procedure by which employees' grievances could be settled. See also United Electrical, etc. v. Mille Metal Products, Inc., 215 F. 2d 221 (4 Cir. 1954), and Metal Polishers, etc. v. Rubin, (Pa. 1949) 85 F. 2d 363, wherein it was stated:

> "* * * under a labor agreement which expressly forbids strikes and lockouts pending the arbitration of dispute, it is not reasonable to suppose that damages resulting from a strike or lockout were contemplated as the subject of arbitration."

The court is satisfied that the contract in the instant case and the provisions for settlement of grievances were intended to avoid strikes and not to settle them. This court

is not convinced that any of the parties to the contract contemplated that the issue of the company's right to damages for an alleged illegal strike or work stoppage should be submitted to an arbitrator rather than to the courts. That arbitrable issues may have lead to the illegal strikes or work stoppages is possible and even probable, but a strike as such does not appear to be such an issue within the terms of the contract. As was stated by the Sixth Circuit in Hoover Motor Express v. Teamsters, etc. at page 53:

> "In the commonly accepted meaning of the term 'grievance,' violation of a no-strike provision in a collective bargaining agreement does not constitute a grievance." and see the cases therein cited.

The court went on to say at p. 54:

> "We think that under the principles laid down in the authorities cited above the calling of the strike did not constitute a grievance; that it therefore was not subject to the settlement procedure of Art. VIII. Section 1 of the contract contemplates that complaints of employees which might eventually culminate in a strike, namely, grievances, were to be settled in a certain manner under Section 1, but the violation of the no-strike agreement of the collective bargaining contract is not a grievance. The record presents no provision that such a situation shall be arbitrated."

Defendants contend, however, that the determination as to the arbitrability of any issue alleged to arise under the collective bargaining agreement must in the first instance be made by an arbitrator rather than by a court. We are not in accord with this position. No good reason has been stated for submitting the question of arbitrability to an arbitrator under the circumstances.

A question remains as to whether the defendant, International Union, was a party to the collective bargaining contract in question in this case. Square D Company v. United Electrical, Radio & Machine Workers of America

et al., (E. D. Mich. 1954) 123 F. S. 776, has been cited with respect to the problem here under discussion. However, an examination of that decision is of little assistance because the contract is not set forth nor is there any discussion indicating how the court arrived at his conclusion.

Attention is also called to U. E. W. v. Oliver Corp. (8 Cir. 1953) 205 F. 2d 376, wherein the International was found to be a party to the contract.

In Boeing Airplane Co. v. Aeronautical Industrial Dist. Lodge No. 751, of International Assn. of Machinists et al., (D. C. Wash. 1950) 191 F. S. 596, the court sets forth and considers the general rules ofor the construction and interpretation of the contracts.

In the instant case it is difficult to determine from the language exactly what was intended by the parties. However, in Article I, Section 1, it is stated:

> "The company agrees to recognize *the Union* as the exclusive collective bargaining agency * * *."

In Article II, Section 1, it is stated:

> "For the purpose of collective bargaining *the Union* will be represented by a shop committee of nine members all of whom shall be employed by the Company."

And in Article II, Section 3:

> "The Local 880 Bargaining Committee shall have the right to have an International representative and Recording Secretary present at any meeting."

Reference is made in another provision of the contract to "*the Union*" and elsewhere reference is made to the Bargaining Committee and the Shop Committee. The contract was signed by the Bargaining Committee, the International representative, and the Regional Director, as well as by representatives of the plaintiff company. It would appear to the court that there is at least a question of fact on which proofs should be received as to

whether the International Union was intended to be a party to the contract in question.

Finally, to be considered is defendants' motion to vacate the notice of taking depositions and to quash the subpoenas. The issue of quashing the subpoenas is now moot and will be determined by the decision relative to the motion to vacate the notice of taking depositions. In this connection it appears that plaintiff, through its counsel, served notice of an intention to take the deposition of "International Union, United Automobile and Aircraft and Agricultural Workers of America (UAW-CIO)," and also of "Benton Harbor Malleable Local No. 880 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), upon oral examination before Weber Sterling, a Notary Public in and for the County of Berrien, State of Michigan." No authority has been cited to the court which is directly applicable to labor unions or other unincorporated associations.

However, the court calls attention to 7 Cyc. Fed. Proc. §25.22:

> "The deposition of a corporation may be taken through an officer, director or managing agent thereof, and only through a person in such relationship to the corporation."

It is further stated in 7 Cyc. Fed. Proc., §25.88:

> "An employer or other party cannot be required to assume the responsibility of determining what officers, employees or witnesses it should produce where the notice of taking of deposition insufficiently designates them."

See also Barron & Holtzoff Federal Practice and Procedure §714.

Exception is also raised as to certain subpoenas which require the production of documents. The court has not been furnished with copies or the originals of the sub-

poenas and is unable to determine the question at this time.

For the reasons herein stated the court finds as follows:

1. Plaintiff's compiaint states facts upon which relief could be granted;

2. Section 301(a) of the Labor Management Relations Act of 1947, (29 U. S. C. A. §185(a)), is constitutional;

3. The collective bargaining agreement is not a contract of employment;

4. The question of an illegal strike is not an arbitrable issue;

5. A claim for damages for an illegal strike or work stoppage is properly submitted to the court;

6. The determination of whether the International Union is a party to the collective bargaining agreement is subject to proof;

7. Defendants are not entitled to a stay of proceedings pending arbitration;

8. The notice of taking the deposition of the International Union and the deposition of the Local Union are too vague to identify the parties and the notices are vacated, provided, however, that plaintiff shall have a right to renew such motion upon proper identification of the persons whose depositions it desires to take, and

9. The court does not rule upon the propriety of the subpoenas duces tecum, but suggests that a motion to produce be filed if production is refused.

For the above reasons the motion to dismiss is denied; the motion to stay proceedings is denied; the motion to vacate the notice of taking of deposition of the International Union and the Local Union is granted as above stated; the motion to quash subpoenas is denied.

W. Wallace Kent,
Judge, United States District Court.

May 28, 1958.